INDEX

CITATIONS

Cases:	Page
Bakelite Corporation, Ex Parte, 279 U. S. 438	5
Federal Radio Commission v. *General Electric Co.*, 281 U. S. 464	2, 3
Federal Trade Commission v. *Klesner*, 274 U. S. 145	5
Federal Trade Commission v. *Klesner*, 280 U. S. 19	6
DeGroot v. *United States*, 5 Wall. 419	6
Good v. *Martin*, 95 U. S. 90	6
Keller v. *Potomac Electric Power Co.*, 261 U. S. 428	4, 5
Old Colony Trust Co. v. *Commissioner*, 279 U. S. 716	4
Postum Cereal Co. v. *California Fig Nut Co.*, 272 U. S. 693	4, 5
Road District v. *St. Louis Southwestern Railway Co.*, 257 U. S. 547	4
Romeu v. *Todd*, 206 U. S. 358	6
United States v. *Coe*, 155 U. S. 76	6
Statute:	
Act of July 1, 1930, c. 788, 46 Stat. 844, amending Sec. 16 of the Radio Act of 1927 (U. S. C. Sup. VI, Title 47, sec. 96)	2–3
Miscellaneous:	
House Report No. 1665, 71st Cong., 2d sess	3

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 657

FEDERAL RADIO COMMISSION, PETITIONER

v.

NELSON BROTHERS BOND & MORTGAGE COMPANY
(Station WIBO)

No. 658

FEDERAL RADIO COMMISSION, PETITIONER

v.

NORTH SHORE CHURCH (STATION WPCC)

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE PETITIONER

On February 2, 1933, a petition was filed in this Court, on behalf of the Federal Radio Commission, for the issuance of writs of certiorari to the Court of Appeals of the District of Columbia to review a decree of that court entered on December 5, 1932, in the above causes. The respondents,

in their brief in opposition, filed February 27, 1933, contend that the petition should be denied on the ground, among others, that this Court is without jurisdiction to review the decree below upon writ of certiorari. We believe that some discussion of the jurisdictional question may be helpful and this reply brief is limited to that question.

The respondents rely chiefly upon the decision of this Court in *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464. In that case, the Court held that under the provisions of Section 16 of the Radio Act of 1927, c. 169, 44 Stat. 1162, 1169, allowing an appeal to the Court of Appeals of the District of Columbia, the functions of the court were purely administrative and that its decisions were therefore not reviewable by this Court. The section then under consideration provided that the Court of Appeals "may alter or revise the decision [of the Commission] appealed from and enter such judgment as to it may seem just."

By the Act of July 1, 1930, c. 788, 46 Stat. 844 (Petition, pp. 20–21), Section 16 of the Radio Act of 1927 was substantially amended so as to provide, with respect to appeals from decisions of the Federal Radio Commission to the Court of Appeals, that—

> (d) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judg-

> ment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of Title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal.

This amendment was adopted only a few weeks after this Court's decision in the *General Electric case,* and the expressed purpose of Congress was to change the law so as to remove the obstacle to review by this Court which was disclosed in that case. House Rep. No. 1665, 71st Cong., 2d Sess.

Since the function of the Court of Appeals, under Section 16 as amended, is confined to the review of questions of law, it seems clear that it may only act judicially and that this Court may review its decisions on certiorari, as expressly pro-

vided by law. The fact that the decisions of the Federal Radio Commission are reviewable by appeal to the Court of Appeals rather than by suit to set aside the Commission's order does not indicate that the proceeding in the Court of Appeals is not essentially judicial. See *Road District* v. *St. Louis Southwestern Railway Company,* 257 U. S. 547, 560; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716. Nor does the fact that the Court of Appeals, upon entry of an order reversing a decision of the Commission, remands the case to the Commission to carry out the judgment of the court indicate that the proceeding is administrative, but rather that the Court of Appeals is acting in a judicial capacity, and that it is for the Commission to exercise the administrative power in the light of the law as announced by the Court of Appeals, or, on certiorari, by this Court.

The decisions in *Keller* v. *Potomac Electric Power Company,* 261 U. S. 428, and in *Postum Cereal Company* v. *California Fig Nut Company,* 272 U. S. 693, relied on by respondents, do not support their contention that the Court is without jurisdiction in this case. In the former case, the Court pointed out that the proceedings in the Supreme Court of the District of Columbia, provided for in the District Public Utilities Act (37 Stat. 938, 974) conferred legislative or administrative functions on that court, since it was empowered to

make the order that the Commission should have made (p. 442). In the *Postum Cereal Company case* this Court held that decisions of the Court of Appeals, under an Act of February 20, 1905 (33 Stat. 724), relating to the registration of trade-marks, were not judicial judgments but administrative decisions, since they were merely instructions to the Commissioner of Patents, not precluding any interested person from contesting the validity of the trade-mark in any court where it might be called in question.

For the purposes of this case it is not necessary to determine whether the Court of Appeals of the District of Columbia is a constitutional or a legislative court. See *Ex Parte Bakelite Corporation,* 279 U. S. 438. Assuming, as the Court stated in that case, that the courts of the District of Columbia are not constitutional courts, it does not follow that Congress can not invest them with judicial functions, nor that this Court is without jurisdiction to review the decisions rendered by the Court of Appeals when acting in that capacity. In *Keller* v. *Potomac Electric Power Co., supra,* the Court indicated that Congress possessed a dual authority over the District and might clothe its courts not only with the jurisdiction and powers of the Federal courts in the several States, but also with such authority as a State might confer on its courts. In *Federal Trade Commission* v. *Klesner,* 274 U. S.

145, the Court held that the Court of Appeals might entertain jurisdiction of suits to set aside or to enforce orders of the Federal Trade Commission, and subsequently, upon certiorari to that court, decided the case on the merits. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19. Appellate jurisdiction has also been exercised in cases coming from the territorial courts (*Romeu* v. *Todd,* 206 U. S. 358; *Good* v. *Martin,* 95 U. S. 90), the Court of Private Land Claims (*United States* v. *Coe,* 155 U. S. 76, 85), and from the Court of Claims (*DeGroot* v. *United States,* 5 Wall. 419).

CONCLUSION

It is respectfully submitted that the Court has jurisdiction to review the decree, and that the petition for writs of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.
WHITNEY NORTH SEYMOUR,
WILLIAM G. DAVIS,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

MARCH, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933